"AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY.

Nothing in this policy or any endorsement hereon shall affect the right of any person entitled to indemnity under this policy or of any other person to recover an amount under or by virtue of the legislation

But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the legislation."

The legislation referred to is section 80(1). The costs therein referred to plainly do not include solicitor and client costs which the insurers pay their own solicitors. Even had the respondents succeeded in persuading this court to accept their interpretation of condition 3, I fail to see how, *dehors* the terms expressly agreed upon for recovery of payment from an insured, they have any further claim to be indemnified in respect of their own solicitors' costs. At the most judgment should have been given for $4,528.95 only, but, for the reasons stated earlier, the claim fails altogether.

I would allow this appeal with costs both here and in the court below.

Gill and **Ali F.JJ.** concurred.

Appeal allowed.

Solicitors: *M. S. Miranda & Co.; Sault, Keith Sellar & Co.*

SUNGEI BIAK TIN MINES LTD. v. SAW CHOO THENG & ANOR. (No. 2)

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) July 13, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 81 of 1969]

Practice and Procedure — Judgment of Federal Court — No provision for liberty to apply in perfected judgment — Whether Federal Court functus officio — Power of court to give effect to its judgment or order — Power of court to make such further or other order as the case requires — National Land Code, s. 417 — Courts of Judicature Act, 1964, s. 69(4).

Land Laws — National Land Code, s. 417 — Federal Court's powers under.

In this case the Federal Court had given judgment in which it held that the defendant (appellant herein) had not been guilty of a breach of a mining sub-lease ([1970] 1 M.L.J. 199). Counsel for the appellant thereupon applied for an order that the cancellation of its sub-lease be deleted and that the sub-lease be restored to the register of the land office. The Federal Court made no decision on the application, but told the appellant to make a formal application. In the meantime, i.e. before the appeal was heard by the Federal Court, the respondents had sub-leased the land to one Lee Yat Kai for three years, which sub-lease had been duly registered by the land office. The appellant made a formal application for an order that the Collector of Land Revenue should delete the cancellation of the sub-lease. This application was opposed by the respondents and by Lee Yat Kai.

Held, allowing the application: (1) although the order of the Federal Court had been perfected and no mention was made in it of liberty to apply, such liberty to apply is to be implied;

(2) the Federal Court had power under section 417 of the National Land Code to do all such things as may be necessary to give effect to its judgment or order and under section 69(4) of the Courts of Judicature Act to "make such further or other order as the case requires";

(3) the court therefore could in the exercise of its appellate jurisdiction order the Collector of Land Revenue to delete the registration of the sub-lease in favour of Lee Yat Kai and instead re-register it in the name of the appellant.

Cases referred to:-

(1) *Baker* v. *Turner* [1950] 1 All E.R. 834.

(2) *Tuck Guat Choo* v. *Cheah Ah Hoe & Anor.* [1932] M.L.J. 109.

(3) *In re Suffield and Watts, Ex Parte Brown* [1888] 20 Q.B.D. 693.

(4) *In re St. Nazaire Co.* (1879) 12 Ch. D. 88.

(5) *Fritz & Hobson* (1880) 14 Ch. D. 542.

(6) *Hadjee Daing Petapak* v. *Hadjee Riok* [1932] M.L.J. 149.

FEDERAL COURT.

Lim Kean Chye for the appellant.

J. Puthucheary for the respondents and Lee Yat Kai.

Cur. Adv. Vult.

Suffian F.J. (read by Azmi L.P.): The plaintiffs (now respondents) hold a mining lease from the Perak Government in respect of certain land. They granted a sublease to the defendant company (appellant). The plaintiffs alleged that the defendant had committed a breach of a condition of the sublease by cutting down rubber trees on approximately 60 acres of the mining land and planting tapioca on it without the plaintiffs' permission.

On 17th July, 1969, Chang Min Tat J., agreeing with the plaintiffs, held that the defendant was guilty of breach of condition and ordered that the sublease concerned be cancelled.

The defendant appealed to the Federal Court, which reserved judgment. It delivered judgment on 9th December, 1969, when, allowing the appeal, it held that the defendant had not been guilty of breach of condition. Thereupon counsel for the successful defendant applied for an order that the cancellation of its sublease be deleted, in other words that its sublease be restored to the register of the land office. The court made no decision on the application, but told the defendant to make a formal application.

The defendant now makes this application for an order that the Collector of Land Revenue of Taiping delete the cancellation of its sublease.

The matter is complicated by the appearance of a new sublessee. After judgment in the lower court and before argument of this appeal on 13th November, 1969, the plaintiffs on 20th August granted a sublease to one Mr. Lee Yat Kai for three years, which sublease has been duly registered by the land office. After the defendant had won in the Federal Court, it wrote to the plaintiffs asking when it could resume mining the land, but the plaintiffs replied saying that the matter had not been concluded as they were applying for leave to appeal to the Yang di-Pertuan Agong, which leave has in fact been granted to them on 24th April, 1970.

Because of Mr. Lee Yat Kai's appearance as sublessee on the register, the defendant company's application is in two parts. First, it asks for an order to delete

the cancellation of its own sublease; secondly, it asks for the cancellation of the registration of Mr. Lee Yat Kai's sublease. If the defendant succeeds, the effect will be that Mr. Lee will cease to be sublessee and he will be replaced by the defendant company.

Mr. Lee Yat Kai has been served with a copy of the relevant papers.

Mr. Puthucheary for the plaintiffs and for Mr. Lee opposes the application on the following grounds.

He says that the new sublessee is now on the register and granting the application will have the effect of removing him from the register. This cannot be done because such removal is tantamount to the exercise by the Federal Court of original jurisdiction and it has original jurisdiction only as given by sections 45 and 46 of the Courts of Judicature Act, 1964, which does not include the power to remove Mr. Lee from any land register. Mr. Puthucheary says that to remove the new sublessee from the register, the plaintiffs should proceed in another court, not here; that the cancellation of mining subleases is controlled by section 97(ii) of the Mining Enactment, F.M.S. Chapter 147, and therefore the plaintiffs should apply to the court of a senior inspector of mines to cancel the sublease and that the ordinary court has jurisdiction over the matter only if the senior inspector refers it to that court. Mr. Puthucheary cites *Baker* v. *Turner*.[1]

Secondly, Mr. Puthucheary says that by virtue of section 35 of the Mining Enactment the new sublessee's title is protected by section 340(1) of the National Land Code so that it is indefeasible and can be defeated only in one of the three ways mentioned in subsection (2) of section 340, and that on the authority of *Tueh Guat Choo* v. *Cheah Ah Hoe and Another*,[2] to defeat the new sublessee's title, the plaintiffs must prove actual fraud, not constructive fraud. At this stage Mr. Lim for the defendant interposes to say that he does not rely on constructive fraud.

Finally Mr. Puthucheary says that the Federal Court order was perfected in December 1969, it did not reserve liberty to apply and therefore the Federal Court is *functus officio*. He cites paragraph 1663 of *Halsbury's* Laws of England, 3rd Edition, Volume 22, and *In re Suffield and Watts, Ex-parte Brown*[3] where at page 697 Fry L.J. said:

> "*In re St. Nazaire Co.*[4] shews that, when an order or judgment of the High Court has once been perfected, the court has no jurisdiction to alter it. So long as the order has not been perfected the judge has a power of re-considering the matter but, when once the order has been completed, the jurisdiction of the judge over it has come to an end."

I am of the opinion that this application should be allowed.

It is true that the order of the Federal Court has been perfected and that nowhere in it is mentioned liberty to apply, but in view of what happened immediately after delivery of our judgment it was the clear intention of this court to allow the defendant to make this application. In any event in every order of the court liberty to apply to the court is implied, without its being expressly reserved, *Fritz* v. *Hobson*.[5]

Our judgment says that the defendant company was not guilty of breach of condition and that therefore its sublease should not have been cancelled. If it had not been cancelled, then the company would still have been the sublessee, and it alone had power to dispose of any interest in the land; the plaintiffs could not have done so and if they have done so to the detriment of the company's right, the court is not powerless to get Mr. Lee Yat Kai off the register. Section 417 of the National Land Code clearly says that the court has power to direct the collector to do all such things as may be necessary *to give effect to its judgment or order*. If we did not order the collector to remove Mr. Lee's name from the register and put back on it that of the defendant company, we would be allowing the plaintiffs and Mr. Lee to thumb their noses at a judgment of the Federal Court, and I do not think that we should allow that. We should give effect to our judgment and order the collector to get Mr. Lee off the register and put the defendant company back on it.

Mr. Lee knew that though the plaintiffs had won and the High Court had ordered the deletion of the defendant's sublease the defendant had lodged an appeal, and yet he took a sublease from the plaintiffs. I do not think it right that he should be allowed to remain on the register.

When the collector takes action to comply with our order he should, of course, cause notice of his action to be served upon any person or body having a claim protected by caveat; subsection (3) of section 417.

In ordering the deletion of the cancellation of the defendant's sublease and cancelling the registration of the new sublessee's sublease this court is not exercising original, but appellate jurisdiction which is governed by subsection (4) of section 69 of the Courts of Judicature Act which gives us power not only to make any order which ought to have been made but also to "make such further or other order as the case requires." The case plainly requires that the defendant be restored to the register.

Mr. Lim for the defendant cites *Hadjee Daing Petipak bin Wak Lundok* v. *Hadjee Riok bin Lahamat*.[6] As I think that we have sufficient power to grant this application in exercise of our appellate jurisdiction, there is no need to express any view on the relevance of that case.

I would therefore order the collector to delete the registration of the sublease in favour of Mr. Lee and instead re-register the sublease in favour of the defendant.

The plaintiffs to pay the costs of this application.

Azmi L.P. and **Ali F.J.** concurred.

Application allowed.

Solicitors: *Lim Cheng Ean & Co.; Skrine & Co.*